



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 2  
290 BROADWAY  
NEW YORK, NY 10007-1866

APR 23 2012

**VIA E-MAIL AND CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

Eric Rothenberg, Esq.  
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Re: Chemical Leaman Tank Lines, Inc. Superfund Site, Logan Township, NJ  
Statement of Position of EPA relating to Quality Distribution Inc.'s failure to pay certain  
Future Response Costs set forth in Bill No. 2721126S050 and Bill No. 2721126S051

Dear Mr. Rothenberg:

This letter responds to your letter dated March 30, 2012<sup>1</sup>, addressed to Carole Petersen, Chief, New Jersey Remediation Branch, US EPA, Region 2 ("EPA"), and to the Statement of Position therein contesting certain Future Response Costs incurred and sought by EPA in the above-referenced bills. This letter represents the EPA Statement of Position.

**Procedural History**

In 1991, the parties entered into a Consent Decree in Civil Action No. 91-2637(JFG) (hereinafter, the "OU1 Decree")<sup>2</sup> which settled certain cost recovery claims which the United States had against Quality Distribution Inc. relating to operable unit one ("OU1") at the Chemical Leaman Tank Lines, Inc. Superfund Site ("Site") located in Logan Township, Gloucester County, New Jersey.

In 2011, the parties entered into a Consent Decree in Civil Action No. 1:10-cv-05098-NLH-KMW (hereinafter, the "OU2/OU3 Decree")<sup>3</sup> which settled certain cost recovery claims the

<sup>1</sup> Exhibit 1: QDI's March 30, 2012 letter and Statement of Position.

<sup>2</sup> Exhibit 2: OU1 Consent Decree.

<sup>3</sup> Exhibit 3: OU2/OU3 Consent Decree.

United States had against QDI relating to operable units two and three ("OU2" and "OU3," respectively) at the Site.

On September 27, 2011, EPA, pursuant to the OU1 Decree, issued Bill for Collection No. 2721126S050 (the "OU1 Bill")<sup>4</sup> to QDI seeking the reimbursement of \$853,248.06 of Future Response Costs incurred by EPA relating to OU1. Also on September 27, 2011, EPA, pursuant to the OU2/OU3 Decree, issued Bill for Collection No. 2721126S051 (the "OU2/OU3 Bill")<sup>5</sup> to QDI seeking the reimbursement of \$236,436.95 of Future Response Costs incurred by EPA relating to OU2 and OU3 at the Site.

On February 15, 2012, QDI paid EPA \$225,608.13 towards the OU1 Bill and paid EPA \$55,224.75 towards the OU2/OU3 Bill<sup>6</sup>. QDI is contesting approximately **\$627,639.93** of Future Response Costs in the OU1 Bill and approximately **\$181,212.20** of Future Response Costs in the OU2/OU3 Bill.

EPA letters of February 17, 2012 and March 12, 2012 letter<sup>7</sup> notified QDI of its non-compliance with several provisions in the OU1 Decree and the OU2/OU3 Decree including provisions relating to the payment of Future Response Costs, submitting a notice of dispute to EPA, contesting Future Response Costs and initiating formal dispute resolution. The February 17, 2012 letter and the March 12, 2012 letter are incorporated by reference herein and form part of the administrative record for this matter.

EPA will nonetheless continue with formal dispute resolution but is not, by participating in formal dispute resolution, waiving any right, claim, interest or cause of action it may have against QDI under the OU1 Decree, the OU2/OU3 Decree or under federal law. Moreover, EPA also specifically reserves its right to seek all interest and penalties which it might be entitled to pursuant to the terms of the OU1 Decree and/or the OU2/OU3 Decree, as described in the EPA letters of February 17, 2012 and March 12, 2012.

As agreed to by EPA and QDI, formal dispute resolution regarding the OU1 Bill and the OU2/OU3 Bill shall proceed in accordance with and pursuant to Paragraph 69 of the OU2/OU3 Decree<sup>8</sup>.

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<sup>4</sup> Exhibit 4: OU1 Bill.

<sup>5</sup> Exhibit 5: OU2/OU3 Bill.

<sup>6</sup> Exhibit 6: Money Transfer for OU1 and Money Transfer OU2/OU3.

<sup>7</sup> Exhibit 7: February 17, 2012 letter and March 12, 2012 letter.

<sup>8</sup> Exhibit 8: E-mail dated April 5, 2012 from Juan Fajardo to Eric Rothenberg and e-mail dated April 5, 2012 from E. Rothenberg to J. Fajardo.

### Consent Decrees

A consent decree is an order and contract that embodies the terms agreed to by the parties, and the integrity of the consent decree must be respected. United States v. Chemical Leaman Tank Lines, Inc., 1994 U.S. Dist. Lexis 11489 (D.N.J. Mar. 30 1994); United States v. Witco Corp., 76 F.Supp.2d 519 (D. Del. 1999).

The OU1 Decree requires QDI to "reimburse the United States for all Future Response Costs not inconsistent with the National Contingency Plan"<sup>9</sup> and defines Future Response Costs as "all costs, including, but not limited to, indirect costs, that the United States incurs"<sup>10</sup> relating to OU1. QDI may contest OU1 Future Response Costs by demonstrating that:

1. The United States made an accounting error, or
2. Future Response Costs include costs that are inconsistent with the NCP<sup>11</sup>.

Similarly, the OU2/OU3 Decree states that QDI "shall pay to EPA all Future Response Costs not inconsistent with the NCP"<sup>12</sup> and defines Future Response Costs as "all costs, including, but not limited to, direct and indirect costs"<sup>13</sup> incurred by the United States relating to OU2 and OU3. QDI may contest OU2/OU3 Future Response Costs by demonstrating that:

1. EPA has made a mathematical error, or
2. EPA included a cost item that is not within the definition of Future Response Costs, or
3. EPA incurred excess costs as a direct result of an EPA action that was inconsistent with a specific provision or provisions of the NCP<sup>14</sup>.

With respect to the OU1 Bill, QDI does not claim that EPA has made an accounting error. With respect to the OU2/OU3 Bill, QDI does not claim that the bill contains a mathematical error or that the bill includes costs not within the definition of Future Response Costs.

Therefore, in order to contest Future Response Costs in the OU1 Bill, QDI must demonstrate that the Future Response Costs in the OU1 Bill are "costs that are inconsistent with the NCP." Similarly, to contest Future Response Costs in the OU2/OU3 Bill, QDI must demonstrate that the contested costs were incurred by EPA as a direct result of an EPA action that was inconsistent with a specific provision of the NCP. For the reasons stated below, QDI failed to demonstrate

<sup>9</sup> Section XII, Paragraph 8 of the OU1 Decree - Exhibit 2.

<sup>10</sup> Section IV, Paragraph I of the OU1 Decree - Exhibit 2.

<sup>11</sup> Section XII, Paragraph C of the OU1 Decree - Exhibit 2.

<sup>12</sup> Paragraph 55 of the OU2/OU3 Decree - Exhibit 3.

<sup>13</sup> Paragraph 4 of the OU2/OU3 Decree - Exhibit 3.

<sup>14</sup> Paragraph 57 of the OU2/OU3 Decree - Exhibit 3.

that any of the costs which are in dispute are costs which QDI should not be required to pay pursuant to the terms of either of the two (2) Decrees.

#### EPA's August 30, 2010 E-Mail

QDI alleges that it had a "side letter exchange" with EPA in August 2010 "wherein the Agency provided its commitment that future OU2 costs would not be "substantial" as compared to past costs..." QDI also alleges that this side letter exchange served as a "material inducement" for QDI to enter the OU2/OU3 Decree. This claim by QDI is totally without merit.

QDI disavowed the existence of any "representation, agreement or understandings relating to the settlement" when it signed the OU2/OU3 Decree. Section XXXIII of the Decree states as follows:

"This Consent Decree and its appendices constitute the final, complete, and exclusive agreement and understanding among the Parties regarding the settlement embodied in the Consent Decree. The Parties acknowledge that there are no representations, agreements, or understandings relating to the settlement other than those expressly contained in this Consent Decree."

Significantly, QDI signed the OU2/OU3 Decree on August 27, 2010 three days before QDI received the e-mail<sup>15</sup> QDI now claims induced it into signing the Decree. Obviously, QDI could not have relied upon an e-mail it had not seen, and that, in fact, did not even exist, before it signed the OU2/OU3 Decree. Furthermore, nothing in the e-mail indicates that there is an agreement or an understanding of any kind. There is no quid pro quo stated in the e-mail. Nor are there any promises or inducements or any kind in the e-mail. Thus, to claim the e-mail represents a "material inducement" which QDI relied upon to sign the OU2/OU3 Decree is completely unfounded. The e-mail merely offered an opinion regarding Future Response Costs in relation to past response costs.

#### Documentation Provided by EPA to QDI to Support the OU1 Bill and the OU2/OU3 Bill

QDI argues that EPA's "persistent failure to document costs is in violation of the National Contingency Plan" and "renders EPA's costs inconsistent with the NCP." Yet, "[c]osts, by themselves, cannot be inconsistent with the NCP. Only response actions..." United States v. Hardage, 982 F.2d 1436, 1443 (10<sup>th</sup> Cir. 1992). QDI's burden is to show a response action inconsistent with the NCP, which is a burden QDI cannot establish by arguing that it needs more supporting documentation.

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<sup>15</sup> Exhibit 9: August 30, 2010 e-mail from J. Fajardo to E. Rothenberg.

Moreover, EPA has provided QDI with more than enough documentation to satisfy the requirements set forth in the OU1 Bill, the OU2/OU3 Bill, and in the NCP.

As noted by QDI, the NCP only requires documentation "sufficient to provide...an accurate accounting of...costs incurred." 40 C.F.R. § 300.160. This standard is satisfied by issuance of an EPA costs package. See United States v. American Cyanamid Co., 786 F. Supp. 152, 156-157 (D.R.I 1992); United States v. Kramer, 913 F.Supp. 848, 856 (D.N.J. 1995); United States v. Meyer, Inc. 889 F.2d 1497, 1497 (6<sup>th</sup> Cir. 1989); United States v. Chromalloy American Corp., 158 F.3d 345, 352 (5<sup>th</sup> Cir. 1998); United States v. Hardage, 982 F.2d 1436, 1442-1444 (10<sup>th</sup> Cir. 1992).

Here, QDI has paid EPA's intramural costs and is only contesting EPA's extramural costs<sup>16</sup>. For extramural costs, the NCP requires no more than a summary, an invoice and proof of payment. See United States v. American Cyanamid Co., 786 F. Supp. 152, 159-161 (D.R.I 1992); California v. Neville Chem. Co., 213 F.Supp.2d 1134, 1138-1141 (C.D. Cal. 2002); United States v. Chrysler Corp., 168 F.Supp.2d 754, 774 (N.D. Ohio 2001) (invoices, Certification of Invoice, and proof of payment is sufficient to prove contractor costs).

In this case, EPA issued the OU1 Bill to QDI with a narrative summary and an Oversight Report, commonly referred to as a SCORPIOS Report (see, Exhibit 4). The OU2/OU3 Bill issued to QDI also included a narrative summary and a SCORPIOS Report (see, Exhibit 5). The narrative summary provides a description of the costs incurred by EPA by category (such as indirect costs, payroll costs, travel costs, Department of Interior costs, U.S. Army Corp of Engineers costs, Lockheed Martin Technology Services costs, and so forth). The SCORPIOS Report includes information demonstrating that EPA incurred and paid the costs in the bill. For instance, the SCORPIOS Report includes voucher numbers, voucher dates, voucher amounts and dates the United States paid the voucher. The bill, narrative summary and SCORPIOS Report comprise the standard costs package prepared by EPA and provided to liable parties for the recovery of oversight costs.

EPA then provided additional documentation to QDI. On December 21, 2011, QDI received three "SPIDER" discs, one for each operable unit, from EPA<sup>17</sup>. The SPIDER discs received by QDI contain further documentation of EPA's OU1, OU2 and OU3 Future Response Costs. For instance, the SPIDER discs include copies of the vouchers themselves and "Proof of Payment" documents showing that EPA paid the vouchers. In providing SPIDER discs to QDI, EPA went beyond the standard costs package required by the NCP.

<sup>16</sup> Exhibit 10: Letter from E. Rothenberg to C. Petersen dated February 22, 2012

<sup>17</sup> Exhibit 11: OU1 SPIDER disc, OU2 SPIDER disc and OU3 SPIDER disc.

Similarly, EPA satisfied its requirements under the OU1 and the OU2/OU3 Decrees. The OU1 Decree requires EPA to send QDI a bill with supporting documentation<sup>18</sup>. The OU2/OU3 Decree requires EPA to send QDI a bill with a SCORPIOS Report<sup>19</sup>. QDI's claim that EPA has not met its document production requirements is without merit.

#### Indirect Costs

QDI argues that Future Response Costs include U.S. Army Corps of Engineer ("Corps") overhead costs that were also subject to EPA "indirect rate cost mark-up." In general, EPA's indirect costs are the costs of administering the Superfund Program - they are not site-specific costs. In order to arrive at the indirect costs for the site, EPA multiplies the indirect cost rate by the direct costs for the site. Contractor costs are direct costs. EPA's indirect costs methodology is proper and in compliance with the Federal Accounting Standards Advisory Board's guidelines. See, United States v. W.R. Grace and Co., 2003 U.S. Dist. LEXIS 15928 (D. Mont. 2003).

#### Reasonable/Necessary Costs

QDI argues that EPA "may not incur costs absent a reasonable determination of necessity." There is no basis for arguing that EPA has to make such a determination. Nothing in the OU1 Decree or the OU2/OU3 Decree requires that EPA make a determination of necessity. Likewise, EPA is not required to make a determination of necessity to successfully bring a cost recovery action under Section 107(a) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9607(a).

QDI makes a similar mistake when it claims that it is only liable for "reasonable" costs incurred by EPA. There is no "reasonable" standard per se. The OU1 Decree does not limit QDI's liability to "reasonable" costs. The OU2/OU3 Decree does not limit QDI's liability to "reasonable" costs. The OU1 Decree and the OU2/OU3 Decree require QDI to reimburse all Future Response Costs which are not inconsistent with the National Contingency Plan by EPA.

EPA's costs are presumed to be reasonable and recoverable as long as the actions taken by EPA are consistent with the NCP. United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 748 (8<sup>th</sup> Cir.1986); United States v. American Cyanamid and Co., 786 F.Supp. 152, 158 (D.R.I. 1992), United States v. Bell Petroleum Services, Inc., 734 F.Supp.771, 780 (W.D. Texas 1990); United States v. Northern Plating Co., 685 F.Supp. 1410, 1417 (W.D.Mich. 1998); United States v. Kramer, 757 F.Supp. 397, 436 (D.N.J. 1991). To defeat the presumption that EPA's costs are reasonable, QDI must identify a particular provision in the NCP with which a specific response action is inconsistent. United States v. American Cyanamid, 786 F.Supp. 152,

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<sup>18</sup> Section XII, Paragraph B of the OU1 Decree - Exhibit 2.

<sup>19</sup> Paragraph 55 of the OU2/OU3 Decree - Exhibit 3.

161. EPA doesn't need to prove its costs are reasonable. Instead, QDI needs to demonstrate that EPA's selection of a response action was arbitrary and capricious. United States v. Kramer, 913 F.Supp. 848, 867 (D.N.J. 1995).

QDI does not proffer an argument that would entitle it to contest EPA's Future Response Costs under the OU1 Decree or the OU2/OU3 Decree or under Section 107(a) of CERCLA.

Moreover, QDI is making the same cost effective argument that the courts have denied before. See e.g. United States v. Consolidation Coal Co., No. 89-2124 (W.D. Pa. July 8, 1991); United States v. Velsicol Chemical Corp., No. 89-2124 (W.D. Tenn. August 7, 1991); United States v. American Cyanamid Co., 786 F.Supp. 152, 162; United States v. Hardage, 733 F.Supp. 1424 (W.D. Okla. 1989).

Allegations that EPA incurred unreasonable or unnecessary costs are not enough to show that an action is inconsistent with the NCP thus entitling QDI to contest EPA's Future Response Costs. Kramer, 913 F.Supp. at 864-865; American Cyanamid, 786 F.Supp. at 161-162.

Certainly this matter might be different if QDI presented evidence of fraud, kickbacks, fictitious bids or gross misconduct. But QDI has not presented evidence of fraud, kickbacks, fictitious bids or other activity that would call into question EPA's costs. Similarly, QDI does not provide evidence that the contractors paid by EPA have reaped unjustified millions, which is the concern voiced by the court in Matter of Bell Petroleum Services, Inc., 3 F.3d 889, 906-908 (5<sup>th</sup> Cir. 1993). Here, QDI merely leaves the impression that something is wrong with EPA's extramural costs. It would be too easy for QDI, or any other party, to avoid liability if it could merely allege that EPA's costs are "unreasonable" and the result of inflated contractor costs. QDI's view that some costs may not be "reasonable" is not the standard for not being obligated to pay EPA's Future Response Costs. The standard, as set forth in the OU1 Decree and the OU2/OU3 Decree, is that the costs must be incurred by EPA as a result of a response action inconsistent with the NCP.

#### Federal Acquisition Regulations/US Army Corp regulations

QDI is raising issues that have been decided by the courts. It is settled that "notwithstanding any other provision of law" in Section 107(a) of CERCLA means just that. United States v. Reilly Tar, 546 F.Supp. 1100, 1118 (D. Minn. 1982); United States v. Hardage, 733 F. Supp. 1424, 1435 (W.D. Okla. 1989). Federal procurement regulations are not relevant to the issue of QDI's liability for Future Response Costs. See, e.g., Hardage, 733 F.Supp. at 1435. Simply put, QDI's liability for EPA's Future Response Costs is not affected by allegations that EPA failed to comply with other provisions of law. See e.g., Reilly Tar, at 1100; United States v. Northeastern Pharmaceutical & Chem. Co., 579 F.Supp. 823, 850 (W.D. Mo. 1984); Hardage, at 1435; United States v. Fairchild Industries, Inc., 766 F.Supp. 405, 411-413 (D. Md. 1991).

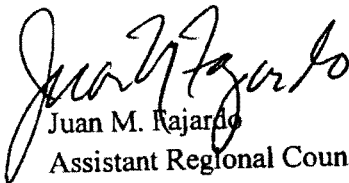
### Conclusion

QDI is liable for all Future Response Costs which EPA billed QDI for in the OU1 Bill and in the OU2/OU3 Bill.

The OU1 Decree permits QDI to contest EPA's Future Response Costs by demonstrating an accounting error or by showing that EPA incurred costs as a result of an action inconsistent with the NCP. The OU2/OU3 Decree permits QDI to contest EPA's Future Response Costs by demonstrating that a mathematical error exists or that costs are not within the definition of Future Response Cost or that EPA incurred costs as a direct result of an action inconsistent with the NCP. QDI has not demonstrated that there was any EPA action taken that was inconsistent with the NCP. Moreover, the documents provided to QDI by EPA to support the costs in the OU1 Bill and the OU2/OU3 Bill satisfy the requirements set forth in the OU1 Decree, the OU2/OU3 Decree and the NCP.

For the reasons stated above, QDI's challenge of EPA's extramural costs in the OU1 Bill and the OU2/OU3 Bill should be denied. The QDI claim that it should not be required to pay approximately \$627,639.93 of Future Response Costs in the OU1 Bill and approximately \$181,212.20 of Future Response Costs in the OU2/OU3 Bill should be rejected in its entirety.

Sincerely,

  
Juan M. Rajardo  
Assistant Regional Counsel